IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1971

NO. 71-148

JOHN KALIN FUNERAL HOME, INC., d/b/a LACEY FUNERAL HOME, a corporation, *Petitioner,*

vs.

HOLLIS FULTZ and JANE DOE FULTZ, his wife, ROBERT J. SELENE and ARLENE SELENE, his wife, and KENNETH N. EROS and BETSY EROS, his wife, d/b/a SELENE and EROS MORTUARY, and DON McCAUGHAN and LUCILLE McCAUGHAN, his wife, d/b/a MILLS and MILLS FUNERAL SERVICE, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

ERICK R. ALDEN and VINCENT GADBOW
DAVIES, PEARSON, ANDERSON & GADBOW
1205 Rust Building
Tacoma, Washington 98402
RALPH G. SWANSON
Security Building
Olympia, Washington 98501
GERRY ALEXANDER and WILLIAM L. PARR
Suite 900 Capitol Center Building
Olympia, Washington 98501
RALPH R. GILBY
Thurston Savings and Loan Building
Olympia, Washington 98501
Attorneys for Respondents.

Dammeier Printing Co. - Tacoma, Washington

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1971

NO. 71-148

JOHN KALIN FUNERAL HOME, INC., d/b/a LACEY FUNERAL HOME, a corporation, *Petitioner,*

vs.

HOLLIS FULTZ and JANE DOE FULTZ, his wife, ROBERT J. SELENE and ARLENE SELENE, his wife, and KENNETH N. EROS and BETSY EROS, his wife, d/b/a SELENE and EROS MORTUARY, and DON McCAUGHAN and LUCILLE McCAUGHAN, his wife, d/b/a MILLS and MILLS FUNERAL SERVICE, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

ERICK R. ALDEN and VINCENT GADBOW
DAVIES, PEARSON, ANDERSON & GADBOW
1205 Rust Building
Tacoma, Washington 98402
RALPH G. SWANSON
Security Building
Olympia, Washington 98501
GERRY ALEXANDER and WILLIAM L. PARR
Suite 900 Capitol Center Building
Olympia, Washington 98501
RALPH R. GILBY
Thurston Savings and Loan Building
Olympia, Washington 98501
Attorneys for Respondents.

Dammeier Printing Co. - Tacoma, Washington

SUBJECT INDEX

Opinion Below 1
Jurisdiction 2
Question Presented 2
Statutes 2
Statement of the Case 2

I.

The Decision Below is Clearly Correct.

A. THE DISTRICT COURT'S GRANTING OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, WHICH WAS AFFIRMED BY THE COURT OF APPEALS, WAS PROPER AND CORRECT, AS NO ISSUE OF FACT EXISTED ON THIS JURISDICTIONAL ISSUE 4

1. Summary Judgment is a proper procedure in anti-trust litigation 4

2. The lower courts had before them a record which indicated that there existed no genuine issue of material fact relating to the question of jurisdiction 5

B. THE SHERMAN AND CLAYTON ACTS, REQUIRING A "RESTRAINT OF TRADE OR COMMERCE AMONG THE SEVERAL STATES," ARE NOT WITHOUT LIMITS OF APPLICATION. 7

II.

THERE IS NO CONFLICT OF DECISION 9

A. EXTENSIVE LITIGATION IN THIS FIELD, IN THIS COURT AND IN OTHERS BELOW IT, HAS DEVELOPED A CONSISTENT THEORY OF REQUISITES FOR THE VALID APPLICATION OF THE FEDERAL ANTI-TRUST ACTS 9

B. THESE REQUISITES WERE PROPERLY APPLIED BY THE TWO COURTS BELOW, IN THE INSTANT CASE 11

TABLE OF AUTHORITIES CITED

CASES

American Mfrs. M.I. Co. v. American Broadcasting, 388 F.2d 272, 278 (2d Cir. 1967) 5

Atlanta Motel v. United States, 379 U.S. 241 (1964) 8

Burke v. Ford, 389 U.S. 320 (1967) 11

Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635, 643 (9th Cir. 1969) 4

Dressler v. MV Sanpiper, 331 F.2d 130 (2d. Cir. 1964) 5

Elizabeth Hospital, Inc. v. Richardson, 269 F.2d 167, 170 (8th Cir. 1959), cert. den. 361 U.S. 884 (1959) 8

First National Bank of Arizona v. City Service Company, 391 U.S. 253 (1968) 4

Hotel Phillips, Inc. v. Journeyman Barbers, 195 F. Supp. 664 (W.D. Mo. 1961), aff'd, 301 F.2d 443 (8th Cir. 1962) 9

Klor's v. Broadway Hale Stores, Inc., 359 U.S. 207, 211 (1959) 8

Las Vegas Merchant Plumbers Ass'n. v. United States, 210 F.2d 732, 739 (9th Cir. 1954), cert. den. 348 U.S. 817 (1954) 9

Lawson v. Woodmere, Inc. 217 F.2d 148, 149 (4th Cir. 1954) 12

Lieberthal v. North Country Lanes, 332 F.2d 269, 270 (2d Cir. 1964) 9

Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1947) 7

Martin v. National League Baseball Club, 174 F.2d 917 (2d Cir. 1949) 12

N.L.R.B. v. Inglewood Park Cemetery Association, 355 F.2d 448 (9th Cir. 1966), cert. den. 384 U.S. 951 (1966) 8

Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 704 (1969) 6

Page v. Work, 290 F.2d 323, 333 (9th Cir. 1961) cert. den. 368 U.S. 875 (1961) 5

Perez v. United States, U.S. (1971) 39 L.W. 4484 8

Poller v. Columbia Broadcasting System, 368 U.S. 464, 573 (1962) 5

Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969) cert. den. 368 U.S. 875 (1969) 5

United States v. Bensinger Co., 430 F.2d 584 (8th Cir. 1970) 7

United States v. Darby, 312 U.S. 100, 120-121 (1940) 8

United States v. Yellow Cab Co., 332, U.S. 218, 230-32 (1947) 12

White Motor v. U.S. 372 U.S. 253, 259 (1962) 4

Wickard v. Filburn, 317 U.S. 111, 125 (1942) 8

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1971

NO. 71-148

JOHN KALIN FUNERAL HOME, INC., d/b/a LACEY FUNERAL HOME, a corporation, *Petitioner*,

vs.

HOLLIS FULTZ and JANE DOE FULTZ, his wife, ROBERT J. SELENE and ARLENE SELENE, his wife, and KENNETH N. EROS and BETSY EROS, his wife, d/b/a SELENE and EROS MORTUARY, and DON McCAUGHAN and LUCILLE McCAUGHAN, his wife, d/b/a MILLS and MILLS FUNERAL SERVICE, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

BRIEF OF RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion delivered in the court below is not yet officially reported, but is appended to the Petition for a Writ of Certiorari. The Memorandum Decision and Order granting Summary Judgment of Dismissal appears at Cr. 849-855 and is reported at 313 F. Supp. 435 (W.D. Wash. 1970). The Findings of Fact and Conclusions of Law appear at 1971 Trade cases pp. 73, 446.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

The sole question decided by the trial court, the sole question considered by the Court of Appeals, for the Ninth Circuit, and the sole question presented by the Petition for a Writ of Certiorari is whether a question of fact exists as to whether or not the activities of respondents complained of by the petitioner were in interstate commerce or had a substantial effect on interstate commerce sufficient to establish jurisdiction in a Federal court to hear petitioner's claim for treble damages under the anti-trust laws.

STATUTES

The statutes involved are correctly set forth by petitioner in the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner alleges that the county coroner, as a result of conspiracy with co-respondent funeral homes, directed law enforcement agencies in Thurston County to deliver bodies in coroner's cases to the two respondent funeral homes on a monthly basis in rotation (Cr. 1-7).

There is no publicly owned morgue in Thurston County and thus no facilities for the holding of remains pending disposition instructions by the next of kin thereby making it necessary for respondent county coroner to use the funeral homes for the holding of the remains. Respondent funeral homes are, therefore, used by the county coroner in lieu of a county morgue as a

holding facility awaiting instructions from next of kin or other authorized persons as to the disposition of remains (Cr. 822).

In some instances where the remains are brought to one of the respondent funeral homes as a holding facility, the remains are later transported, at the direction of the next of kin, to other funeral homes for disposition (Cr. 822).

All discovery relative to the jurisdiction was exhausted by both petitioner and respondents, and all jurisdictional facts were before the court at the time the court made its decision on a motion for summary judgment (Cr. 756, 764, 769, 797).

Petitioner's sole argument and position was that issues of fact as to whether or not the Federal court had jurisdiction existed.

Respondent funeral homes exercise no discretion as to where bodies were to be shipped (Cr. 879). The decision about shipment of bodies is made by next of kin or some other person (Cr. 821, 823).

Respondent funeral homes did not cross state lines in delivering bodies for shipment or receiving bodies for shipment (Cr. 879).

All mortician supplies and other equipment used by petitioner and respondent funeral homes are utilized in the performance of mortician services and are not resold as supplies (Cr. 880).

Respondent county coroner has jurisdiction of dead bodies in Thurston County only in certain specified situations. The jurisdiction of respondent coro-

ner was limited to Thurston County. The activities complained of by petitioner occurred only in Thurston County and were operative only in Thurston County (Cr. 821).

Respondent funeral homes deny that they had done anything to prevent, hinder or obstruct the establishment of petitioner's mortuary business or to influence the respondent coroner to deprive the petitioner of any business, or that they had any influence of any kind over the respondent coroner (Cr. 843, 844).

I.

THE DECISION BELOW IS CLEARLY CORRECT

A. THE DISTRICT COURT'S GRANTING OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, WHICH WAS AFFIRMED BY THE COURT OF APPEALS, WAS PROPER AND CORRECT, AS NO ISSUE OF FACT EXISTED ON THIS JURISDICTIONAL ISSUE.

1. Summary Judgment is a proper procedure in anti-trust litigation.

"Summary Judgments have a place in the anti-trust field," as was pointed out by this Court in *White Motor Co. v. U.S.* 372 U.S. 253, 259 (1962). See also *First National Bank of Arizona v. City Service Company,* 391 U.S. 253 (1968). Some of the Law in this area is so well developed that where the gist of the case turns on documentary evidence, the rule of the case at times can be defined without a trial. *White Motor Company v. U.S., supra* at 259. See also *Chapman v. Rudd Paint and Varnish Co.,* 409 F.2d 635,

643 (9th Cir. 1969). In *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F. 2d 341 (9th Cir. 1969) and *Page v. Work*, 290 F.2d 323, 330 et seq. (9th Cir. 1961), cert. den. 368 U.S. 875 (1961), summary judgment was granted on the precise jurisdictional question at issue in the instant case.

The importance of summary judgment as a procedural weapon to pierce sham claims and resolve actions where the facts are undisputed has been frequently noted by the courts. *American Mfrs. M.I. Co. v. American Broadcasting*, 388 F.2d 272, 278 (2d Cir. 1967). The 1963 amendments to F.R.C.P. Rule 56 seem to indicate that the courts thereafter were to approach the Rule with less reticence and more resoluteness. *American Mfrs. M.I. Co. v. American Broadcasting, supra* at 278; *Dressler v. MV Sanpiper*, 331 F.2d 130 (2d Cir. 1964). See also 3 Barron & Holtzoff, Federal Practice and Procedure, § 1231, at page 97 et seq. (Wright Ed. 1958).

2. The lower courts had before them a record which indicated that there existed no genuine issue on a material fact relating to the question of jurisdiction.

While this court had admonished us that summary judgments in the anti-trust field are not appropriate "where motive and intent play leading roles," *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 573 (1962); *White Motor Co. v. U.S., supra* at 259, such a warning is not appropriate here as the issue of jurisdiction cannot be so characterized as an issue of "motive or intent." This is not a case "where the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Col-*

umbia Broadcasting, supra at 473; *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969).

As petitioner concedes in his brief (p.4), extensive pretrial discovery was held on the jurisdictional issue as well as on the merits of this case: The District Court had before it numerous depositions and other papers of discovery on which to base its decision. Unlike *American Mfrs. M.I. Co. v. American Broadcasting, supra,* where the summary judgment decision (subsequently reversed in favor of a jury trial) purported to decide the meaning and reasons behind complex acquisition practices of two large companies, the instant case rests upon facts, openly laid out in the record, which literally speak for themselves: The nature of the parties' funeral home business; the names and types of supplies for these businesses; the customers of the parties' businesses. Counsel in the instant case have, in fact, certified that discovery as to facts pertaining to jurisdiction has been fully completed and exhausted by all the parties (See Appendix A, ii, Petitioner's Brief).

It is not an axiom of trade regulation practice that all anti-trust litigation is inherently complex and multi-faceted. *Chapman v. Rudd Paint & Varnish Company, supra* at 643. Summary judgment is properly entered in an anti-trust action where there is an absence of any significant probative evidence tending to support the complaint, *First National Bank of Arizona v. City Service Co., supra* at 290. Both courts below had ample and complete evidence on the record before them on which to consider the jurisdictional issue. The entire scope and gamit of evidence was before the learned courts below, and there was no question of fact to be decided. The use of the summary judgment procedure was thus both warranted and appropriate.

B. THE SHERMAN AND CLAYTON ACTS, REQUIRING A "RESTRAINT OF TRADE OR COMMERCE AMONG THE SEVERAL STATES," ARE NOT WITHOUT LIMITS OF APPLICATION.

The Sherman and Clayton Acts, requiring a "restraint of trade or commerce among the several states," are not without limits of application.

It is a jurisdictional requirement of the Sherman Act that the acts constituting the violation be "in restraint of trade or commerce among the several states" (15 U.S.C. § 1). In other words, it is said that the "restraint" must be upon interstate commerce. See *United States v. Bensinger Co.*, 430 F.2d 584 (8th Cir. 1970). The general language of the Sherman Act and of the Clayton Act was designed by congress to exercise its powers under the Commerce Clause of the Constitution. U.S. Const. act 1, §8, cl. 3. *Page v. Work, supra* at 333.

"Despite the increased thrust of Federal commerce power as business operations become more interrelated and complex, the courts have consistently required that in order for Federal anti-trust jurisdiction to be sustained the effect on interstate commerce of an alleged anti-trust violation in a local area must be direct and substantial, and not merely inconsequentive, remote, or fortuitous." *Page v. Work, supra,* at 332 and cases cited therein, including *Mandeville Island Farms v.*

American Crystal Sugar, 334 U.S. 219 (1947), and *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167, 170 (8th Cir. 1959), cert. den. 361 U.S. 884 (1959). Although Congress created these acts to utilize the Commerce Clause's most wide-ranging implications, nevertheless "it must be *interstate commerce* which feels the pinch, or competition in *interstate commerce* which may be substantially lessened, or where there is a tendency toward the creation of a monopoly in *interstate commerce*, before the provisions of said section become applicable." *Page v. Work, supra* at 333. (emphasis added). In accord are *Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959); *Mandeville Island Farms v. American Crystal Sugar, supra* at 232.

Even the most far-reaching and broad interpretations of the scope and nature of the Commerce Clause consistently recognize that the nub of a Federal antitrust act is the adverse effect of the complained of behavior on *interstate commerce*. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), and cases cited below.

Unlike cases involving the N.L.R.B., *N.L.R.B. v. Inglewood Park Cemetery Ass'n.*, 355 F.2d 448 (9th Cir. 1966), cert. den., 384 U.S. 951 (1966) or Consumer Credit Protection Act, *Perez v. United States*, ... U.S. ..... (1971), 39 L.W. 4484, where "a class of activities" (see also *Atlanta Motel v. U.S.*, 379 U.S. 241 (1964)) is defined by Congress to be *per se* prescribed by the particular Federal act in question, Congress has left to the courts to determine whether interstate or intrastate activities have the prohibited effect on commerce, as in the Sherman Act. See *United States v. Darby*, 312 U.S. 100, 120-121, (1940), which makes this distinction.

II.

THERE IS NO CONFLICT OF DECISION

A. EXTENSIVE LITIGATION IN THIS FIELD, IN THIS COURT AND IN OTHERS BELOW IT, HAS DEVELOPED A CONSISTENT THEORY OF REQUISITES FOR THE VALID APPLICATION OF THE FEDERAL ANTI-TRUST ACTS.

No amount of partisan argument can disguise the fact that the courts have consistently — and without aberration by any circuit—developed clear and unconfused guidelines as to valid application of the Federal anti-trust acts where matters of jurisdiction are at issue.

"There are two tests to determine whether interstate commerce is involved: (1) whether the acts complained of occurred within the flow of the interstate commerce; or (2) whether the acts complained of while wholly intrastate, substantially affected interstate commmerce". *Sun Valley Disposal Co. v. Silver State Disposal, supra* at 343. In accord using the precise language cited above, including the word "substantially" in reference to otherwise intrastate acts, are: *United States v. Bensinger, supra* at 588; *Lieberthal v. North Country Lanes,* 332 F.2d 269, 270 (2d Cir. 1964); *Page v. Work, supra* at 331; *Elizabeth Hospital, Inc. v. Richardson, supra* at 170; *Las Vegas Merchant Plumbers Ass'n v. U.S.,* 210 F.2d 732, 739 (9th Cir. 1954), cert. den., 348 U.S. 817 (1954); *Hotel Phillips, Inc. v. Journeyman Barbers,* 195 F. Supp. 664 (W.D. Mo., 1961) aff'd, 301 F.2d 443 (8th Cir. 1962).

Petitioner rails at great length in his brief about alleged *per se* violations of the anti-trust acts by respondents (i.e. p.14 et seq.), apparently believing that

"*per se*" restraints of any trade or commerce automatically signal Sherman and/or Clayton Act violations. This is the result of a misreading of the statutes themselves (see Section A. above) and of subsequent court decisions construing these statutes.

Where the activities complained of are of an intrastate character, in order for there to be a Sherman and Clayton Act violation, it must be shown that the restraint directly and substantially affects interstate commerce. *United States v. Bensinger, supra* at 588 and cases cited below. "Where the activities are interstate in nature, the interstate commerce issue depends upon whether the restraint is a *per se* violation of the Act. . . . Where there is a *per se* violation, the effect upon interstate commerce follows as a matter of law and is conclusively presumed." *United States v. Bensinger, supra* at 588 and in cases cited below.

It is clear from the above-quoted language that the *per se* presumption only comes into effect where the *activities complained of are interstate in nature.* It is not, as petitioner would like to argue, an automatic presumption. The first question to be decided is always whether the alleged conspriacy was intrastate or interstate in character. It is only after this important characterization is made that the Federal acts and any presumptions that might be construed to be inherent in them, can be properly considered.

B. THESE REQUISITES WERE PROPERLY APPLIED BY THE COURTS BELOW, IN THE INSTANT CASE.

Plaintiff argues that since *Burke v. Ford,* 389 U.S. 320 (1967), the mere purchase of supplies in interstate commerce is sufficient to invoke Federal jurisdiction. They argue that the test of jurisdiction set forth in *Sun Valley, supra* and *Las Vegas, supra,* for determining jurisdiction has been erased by the *Burke* decision.

This is misreading *Burke.* In that case, plaintiff alleged that defendant wholesalers of liquor had agreed to divide the liquor market for the entire State of Oklahoma. Thus, six wholesalers from Oklahoma City sold in one area, six from Tulsa sold in a second, etc. In Oklahoma City and in Tulsa, the wholesalers divided the brands so that within any one area, any one brand was carried by only two or three wholesalers.

In deciding the appeal, The Supreme Court recognized the two tests previously discussed for determining jurisdiction. *Burke v. Ford, supra* at 555. The court went on to hold that state-wide territorial division of the sale of liquor manufactured out of state did, in fact, substantially affect interstate commerce.

The holding of *Burke* must be limited to its facts, that is, a state-wide market division of a $45,000,000 business. The case does not stand for the proposition that a Federal court has jurisdiction over anti-trust violations any time a company purchases materials in interstate commerce.

Plaintiff also argues that the holding in *Klor's, Inc. v. Broadway-Hale Stores, Inc., supra* at 207, is controlling in this case. In that case plaintiff alleged that the manufacturers of well known brands of appliances, such as General Electric, RCA, Admiral, etc. conspired not to sell to plaintiff or to sell at discriminately high prices to plaintiff. Plaintiff was a retail outlet for such appliances. There, the conduct complained of directly affected interstate commerce, that is, the refusal of seller to sell to plaintiff goods manufactured out of state and shipped directly to the plaintiff, and which goods plaintiff intended to resell. Also, the plaintiff complained of a price-fixing conspiracy, an allegation not present in the case at bar. In this case there is no allegation of conduct which would affect the sale of caskets or other items delivered in interstate commerce.

The incidental flow of supplies in interstate commerce does not, by itself, suffice to transform essentially intrastate activity into an interstate one within the scope of the antitrust laws. *Page v. Work, supra* at page 332 (publishing legal notices); *Elizabeth Hospital, Inc. v. Richardson, supra* at 170 (hospitals); *Lawson v. Woodmere, Inc.*, 217 F.2d 148, 149 (4th Cir. 1954 (cemetery vaults); the interstate travel of customers of the local enterprise, *United States v. Yellow Cab Co.*, 332 U.S. 218, 230-32 (1947) (taxicab service to and from railroad stations); *Elizabeth Hospital, Inc. v. Richardson, supra* at 170-71, (the solicitation of business in other states for the local enterprise); *Page v. Work, supra* at 329, (the utilization of interstate communications media); *Martin v. National League Baseball Club*, 174 F.2d 917 (2d Cir. 1949), (interstate broadcast of baseball games), or a location in an area of interstate activity, *Hotel Phillips, Inc. v. Journeyman Barbers, etc., Union, supra* (barbershops in greater Kansas City Metropolitan area.)

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated this 7th day of September, 1971.

ERICK R. ALDEN
VINCENT GADBOW
RALPH G. SWANSON
GERRY ALEXANDER
RALPH R. GILBY
WILLIAM L. PARR
By ERICK R. ALDEN
Attorneys for Respondents.